IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 9, 2008 Session

IN RE ADOPTION OF M. D. W., JR.

Appeal from the Chancery Court for Stewart County
No. 06-12-179 Robert E. Burch, Chancellor

No. M2007-01689-COA-R3-PT - Filed March 26, 2008

The biological father of M.D.W. appeals the termination of his parental rights. He maintains that he should have been personally served rather than served by publication and that he had no notice of the final hearing. Since constructive service is intended to be the last resort and is only permitted when the defendant's residence is unknown, counsel's knowledge of the biological father's address before service by publication was completed created an obligation to provide actual service to the biological father. We, therefore, vacate the order and remand the case to the trial court.

Tenn. R. App. P. 3; Judgment of the Chancery Court
Vacated and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M. S., and FRANK G. CLEMENT, JR., J., joined.

Seth W. Rye, Erin, Tennessee, for the appellant.

Timothy K. Barnes, Clarksville, Tennessee, for the appellee.

OPINION

This is an appeal from an order terminating the parental rights of the biological father of M.D.W. In 2001, M.D.W. was born. His mother was married at the time, but not to the biological father. The petitioners brought this action on April 5, 2006, to terminate the parental rights of the mother, the legal father,[1] and the biological father and to adopt the child. They allege that the legal father and the biological father have failed to visit or support the child for more than six months preceding the filing of the petition and that the mother has failed to visit or support the child for more than three years preceding the filing of the petition. The last known address of each defendant is listed in the petition, which asks for service of the petition or, in the alternative, that publication issue. Service by certified mail was attempted on the biological father at his last known address, but

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[1] A man married to the biological mother of a child born during their marriage is a "legal parent" of the child under Tenn. Code Ann. § 36-1-102(28)(B).

it was returned unserved on April 21, 2006. Notice of the lawsuit was published weekly in the *Stewart Houston Times* May 23, 2006, through June 13, 2006. The biological father's mother told him of a notice in the paper,[2] and he wrote the court a letter dated May 3, 2006, alleging that he had been kept from the children and stating, "I just Learned [sic] about this Matter [sic] and want to be with my Kids [sic]." A return address in Greenbrier, Tennessee, was printed on the envelope. A notice of the final adoption hearing was sent to the Greenbrier address on May 15, 2007, but the biological father claims that he did not receive any notice of the hearing until two days after the June 22 hearing. The biological father appeals and maintains that once his address was known, he should have been personally served. Furthermore, he claims that the termination order was not valid because he had no actual notice of the hearing.

The appellate court reviews the findings of fact of the trial court de novo upon the record with a presumption of correctness unless the preponderance of the evidence is otherwise. *In Re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). Issues of law are reviewed de novo upon the record with no presumption of correctness. *Id.*

Service of process in termination of parental rights cases in chancery courts is accomplished pursuant to the Tennessee Rules of Civil Procedure and state statutes. Tenn. Code Ann. § 36-1-117(m)(1). Tenn. R. Civ. Proc. 4.08 defers to the statutes on constructive service, unless otherwise expressly provided in the rules. Several statutes come into play. Tenn. Code Ann. § 21-1-203(a) allows personal service of process to be dispensed with in certain situations, the pertinent one in this case being subsection (a)(5), "[w]hen the residence of the defendant is unknown and cannot be ascertained upon diligent inquiry." To dispense with process in any of the instances found in subsection (a), subsection (b) requires that the facts "be stated under oath in the bill, or by separate affidavit, or appear by the return." Similarly, Tenn. Code Ann. § 36-1-117(m)(3) states that "[a]ny motion for an order of publication in these [termination] proceedings shall be accompanied by an affidavit of the petitioners or their legal counsel attesting, in detail, to all efforts to determine the identity and whereabouts of the parties against whom substituted service is sought." The order is to run four consecutive weeks in the newspaper designated in the order or by court rule. Tenn. Code Ann. § 21-1-204(b).

Tenn. Code Ann. § 21-1-203(a) requires "diligent inquiry" to attempt to determine the unknown father's residence. Tenn. Code Ann. § 36-1-117(m)(3) places the burden of demonstrating diligent inquiry upon the petitioners by requiring a detailed affidavit from the petitioners or their legal counsel attesting to all efforts made to determine the whereabouts of the unserved party. In this case, there is no affidavit from the petitioners or their attorney detailing their efforts to locate the biological father. There is no order of the court making any findings about efforts to locate him. There is no transcript or statement of the evidence as to any testimony in this regard.

[2] On May 2, 2006, a notice ran in *The Stewart Houston Times* in regard to another action filed against the same defendants to terminate their rights to another child.

The biological father's letter, dated May 3, 2006, and filed with the court on May 19, 2006, provided clear evidence of his whereabouts since there was a return address on the envelope. Yet, no action was taken except to allow the publication of the notice of the lawsuit in the *Stewart Houston Times* May 23, 2006, through June 13, 2006. This inaction goes beyond lack of "diligent inquiry" into the realm of lack of "diligent effort." The biological father's address practically dropped into the lap of the petitioner's counsel, but he took no action other than to let the publication proceed. Valid service by publication was not completed at the time the petitioners' counsel would have become aware of the biological father's current address. Constructive service is the last resort and is only permitted when the defendant's residence is unknown. Tenn. Code Ann. § 21-1-203(a)(5). Certainly, when constructive service has not been completed and petitioners' counsel learns of the defendant's address, there arises an obligation on the part of petitioners' counsel to attempt service by other, better means that are more likely to achieve actual service. The fundamental fairness of a judicial proceeding requires nothing less.

The petitioners' counsel defends the actions taken (or not taken) below by arguing that the biological father waived the defect in constructive service by filing an answer, the May 3, 2006, letter, that did not raise the defect as a defense. [3] That letter was treated as an answer by the clerk and by the court.[4] In order to determine whether the letter should be treated as an answer, we must look to whether the letter meets the basic requirements of an answer. It was mailed to the Clerk and Master at Dover "ATTN Case of [F.M.W.]."[5] The letter, addressed "To Whom it may Concern," named the three children the biological father sired with the mother. The document is not called an answer by the author, rather internally it is referred to as "this letter." It contains a brief explanation of how the children got into their present situation and states that "[t]his whole time Ive [sic] been keep [sic] from seeing or even talking to the kids on the phone." It concludes "I just Learned [sic] about this Matter [sic] and want to be with my Kids [sic]. They have been keep [sic] from me unwillingly. Ive [sic] not done anything But [sic] try to be a good Father [sic] to them."

People who decide to represent themselves deserve fair and equal treatment. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000). Many pro se litigants have little knowledge of the legal system and the courts should take this into account. *Irvin v. City of Clarksville*, 767 S.W.2d 649, 652 (Tenn. Ct. App. 1988). Courts must be careful, however, not to be so mindful of being fair to a pro se litigant that we are not fair to the litigant's adversary. *Nash v. Waynick*, No. M2000-02096-COA-R3-CV, 2001 WL 36073, *3 (Tenn. Ct. App. April 12, 2001) (no Tenn. R. App. P. 11 application filed). Courts, therefore, apply the substantive and procedural rules that all parties are required to obey to pro se and represented litigants alike. *Edmundson v. Pratt*, 945 S.W.2d 754, 755 (Tenn. Ct. App. 1966). Courts will give pro se litigants who have no legal training some leeway in drafting court documents. *Whitaker*, 32 S.W.3d at 227.

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[3] Tenn. R. Civ. Pro. 12.08 indicates that a party waives all defenses and objections not raised by motion, answer or reply, with certain exceptions not applicable here.

[4] Default judgments were entered against the mother and the legal father, but not against the biological father.

[5] The notice which prompted the letter concerned a termination case involving another of the biological father's three children with this mother.

Clearly, the biological father's letter does not conform to the usual format of an answer or other pleading as discussed in Tenn. R. Civ. P. 10.01, but that fact alone is not determinative. See *Nash,* 2001 WL 36073 at *3. He sent the letter to the court clerk immediately upon becoming aware of the published notice of another termination action and even before the constructive notice was attempted in this case. There is no indication that it was mailed to or otherwise served on the other parties, so it cannot be said that it was served on them in accordance with Tenn. R. Civ. P. 5.01. While the letter attempts to explain the failure to contact the children, it does not attempt to admit or deny the averments in the complaint as required by Tenn. R. Civ. P. 8.02 – indeed there is no indication that the biological father had even seen the complaint at the time the letter was written. Viewing all these facts as a whole, it is our opinion that this letter was not an answer within the legal meaning of the term, and it did not waive the defects in constructive service.

The order of the trial court filed June 22, 2007, which terminated the parental rights of the biological father and ordered the adoption of M.D.W., is vacated and the case is remanded to the trial court for further proceedings consistent with this opinion. Costs of appeal are assessed against the appellees, for which execution may issue, if necessary.

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ANDY D. BENNETT, JUDGE